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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1941.

CHARLES M. KOEBERLEIN,
Petitioner,

vs.

GEORGE W. DURBIN and MINNIE L. DURBIN; THE CARTER OIL COMPANY; MABEL DURBIN and HARVEY H. DURBIN,
Respondents.

No. 232.

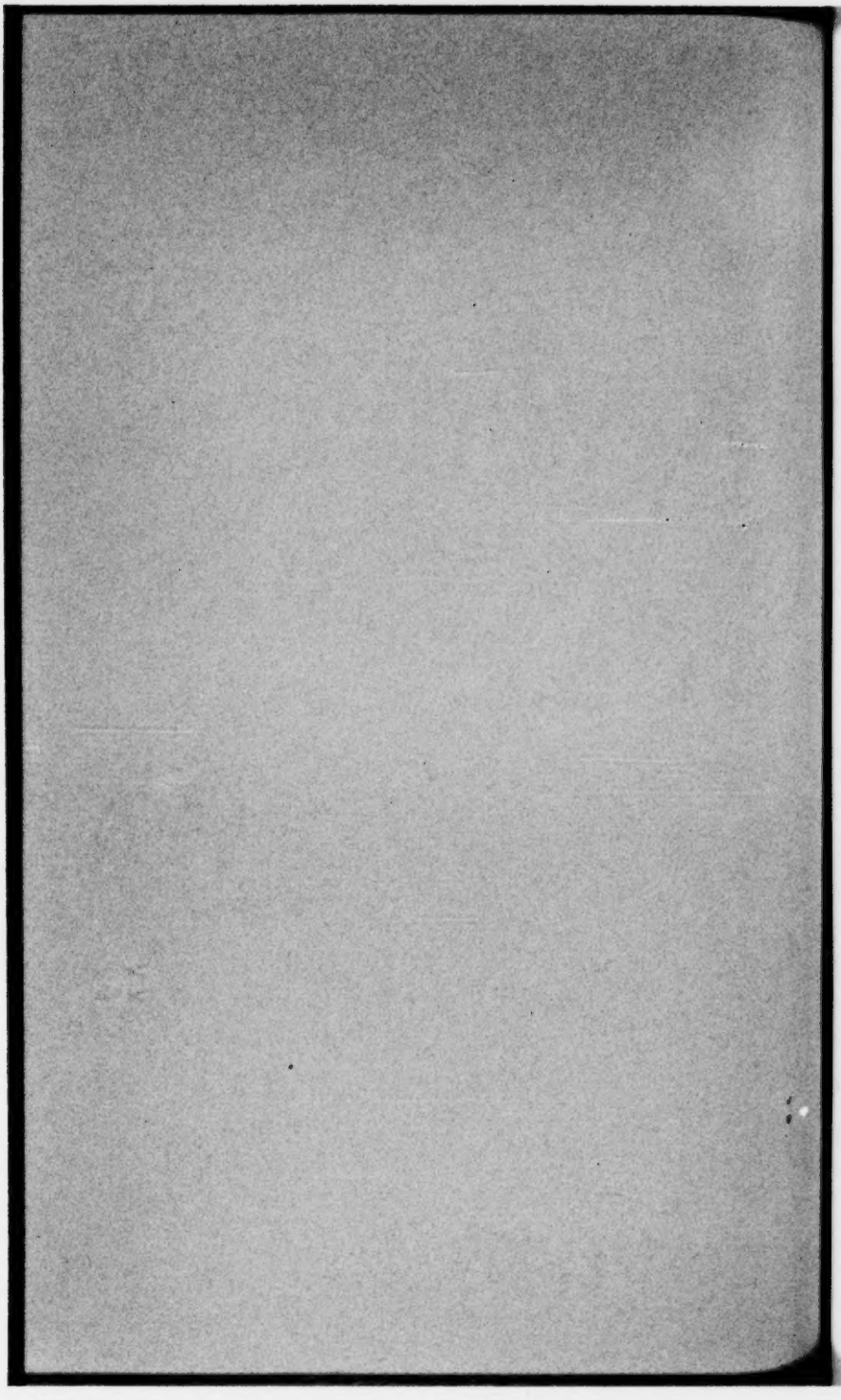
BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

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STATEMENT OF THE CASE.

Respondents deem it advisable to make a brief additional statement in order to present certain important and essential matters omitted from the petition for certiorari and necessary to a fair determination of the case.

As to the part of the statement of petitioner denominated "Pleadings of Respondents and Petitioner in the Litigation Here Involved" respondents say that the pleadings on their part with respect to the two deeds, that is, the one from Mabel Durbin and Harvey Durbin, and the one from these respondents, allege they were made on

the same day, as a part of the same transaction, made before the time limit of ninety days fixed by the strict foreclosure decree had expired, and were, in fact, made as a bar to said foreclosure and in compromise of the mortgage indebtedness.

Paragraph XIII of the answer of respondents (R. 56-67) and by restatement and realleging made a part of the counterclaim (R. 58) is as follows:

> "Defendants, further answering, say that at the time the said deed by them signed, executed and delivered to Charles M. Koeberlein was made, that said deed was, in fact and effect, only a mortgage to secure to the said Charles M. Koeberlein the amount so paid by him to said Mabel Durbin to prevent the decree for strict foreclosure from taking effect against these defendants; that the deed made by Mabel Durbin and her husband to Charles M. Koeberlein and the deed made by these defendants to Charles M. Koeberlein were, in fact, made on the same date and were a part of the same transaction and were made before the time limit of ninety days fixed by said decree of strict foreclosure, and were, in fact, made as a bar to said foreclosure and in settlement and compromise of the said mortgage indebtedness; that the said deed so made by these defendants as recorded is but a security for the moneys so paid by Charles M. Koeberlein for these defendants, and that they have full right to reimburse said Charles M. Koeberlein and have redeeded to them by said Charles M. Koeberlein the said described premises."

In answering these allegations (R. 64-65) petitioner admits that said two deeds were made and delivered the same day, but denies that they constituted one transaction; admits that they were made before the expiration of the ninety-day period, but denies that the deed of respondents was as security, and denies any agreement that respondents have a right to redeem.

He further avers (R. 65) that he acquired no title to the lands from respondents, but derived title to the lands under the deed from Mabel and Harvey Durbin, and that the deed from George and Minnie Durbin was made only for the purpose of waiving their right of redemption, and further denies any understanding or agreement with respondents giving them a right to redeem, or that their deed was only security for indebtedness. He further states that at no time prior or subsequent to the signing of the deed by respondents was any sum due petitioner from respondents (R. 66).

The case was tried before the Court. There was conflicting testimony on whether or not the two deeds were made and delivered the same day. The pleadings admitted that they were, but petitioner strenuously denied the allegation in his testimony. The Court found against petitioner in so far as Carter Oil Company is concerned, but found in favor of petitioner and against respondents, and dismissed their counterclaim. Appeal by petitioners as to Carter Oil Company and cross appeal by respondents.

The Opinion of the Supreme Court:

The Supreme Court of Illinois found that the pleadings alleged in legal effect the relation of mortgagor and mortgagee, and on the evidence in the record found that George W. Durbin and Minnie L. Durbin never surrendered their right to redeem.

Petitioner quotes correctly in his summary statement portions of the opinion of the Supreme Court. We believe that he omits vital and controlling portions of that opinion in so far as questions raised by the pleadings are involved. Praying the indulgence of this Honorable Court, we respectfully submit a part of the opinion wherein the Court sets forth the pleadings, the facts as found by

the Court, the legal effect of the pleadings and the value of the evidence offered by the parties as follows (R. 337-338-339):

> "The counterclaim of the Durbins requires our first consideration, because if it is sustainable there is no occasion to consider any of the other arguments or points presented. It was, in substance, alleged by them that the deed which they gave to Koeberlein was, in fact, intended as security only for money to be paid by Koeberlein to Mabel Durbin to prevent the decree of strict foreclosure from becoming final and to allow them a period of redemption; that the deed from Mabel to Koeberlein and the deed from George W. and Minnie L. Durbin to Koeberlein were, in fact, made on the same date as a part of the same transaction, within the period of ninety days limited in the decree of strict foreclosure and in settlement and compromise of the mortgage indebtedness. It was their prayer for relief that they be permitted to repay to Koeberlein the sum of money which he had advanced for them and that he be required to convey the premises to them; that it might be found that the premises had a value not exceeding $1,000 and was the homestead of the counterclaimants, and that, therefore, Koeberlein took nothing by the deed. There was also a prayer for general relief and an attached copy of a tender from them to Koeberlein of all redemption money, dated March 30, 1939."
>
> "To this counterclaim Koeberlein answered, in substance admitting that that the deed from George W. and Minnie L. Durbin was signed and delivered on the same date as the deed from Mabel Durbin. It is to be noted, in this connection, that on trial of the case he strenuously contested this date. The answered denied any promise of a right to redeem and averred that Koeberlein acquired title to the premises under a deed from Mabel Durbin and her husband, dated July 26, 1937, and that 'said deed made by said George W. Durbin and Minnie L. Durbin to this defendant was

made only for the purpose of waiving the right to redeem from said foreclosure decree; * * * that by said deed said George W. Durbin and Minnie L. Durbin did waive the right to redeem from said foreclosure decree.' His answer further avers 'That said deed was made solely for the purpose of waiving the right of the said George W. Durbin and Minnie L. Durbin and of the plaintiff herein to redeem said premises from said foreclosure decree, the title to which is already vested in this defendant by said foreclosure decree and by said deed from Mabel Durbin and Harvey H. Durbin, her husband, to this defendant.' It will be noted from the foregoing pleadings that Koeberlein squarely placed his case and the theory of the title by which he claims on (1) the quitclaim deed from Mabel and Harvey Durbin of July 26, 1937, and (2) a release by George W. and Minnie L. Durbin of their right of redemption, said to have been accomplished by their quitclaim deed of the same date and another document called 'Waiver of the right of redemption,' executed at the same time, and which will be referred to later. It is therefore necessary, first, to inquire as to the nature, character and extent of the title conveyed by the quitclaim deed from Mabel Durbin, and, second, as to the legal effect of the quitclaim deed and waiver of redemption executed on the evening of the same day by George W. and Minnie L. Durbin at their home, and not notarized.

"The answer of Koeberlein indicates a definite misconception of the legal effect of the quitclaim deed which he obtained from Mabel. At the time this deed was executed, Mabel's mortgage and mortgage indebtedness had been merged in the decree of strict foreclosure which she had obtained and that decree represented the extent of her rights against George W. Durbin and Minnie L. Durbin and her interest in the real estate in question. Under the strict terms of that decree she would have become entitled to an indefeasible estate in the land eventually, i. e., ninety days

after the decree, but no sooner—and not at all if the money due her was paid. Prior to the decree she was the owner of the legal title to the land, but it was an anomalous title, existing only as between her and George W. Durbin and only for the limited purpose of securing her indebtedness. As against every other person and for every other purpose George W. Durbin was the owner (Lightcap v. Bradly, 186 Ill. 510, and cases there cited). It necessarily follows that when Koeberlein took his quitclaim deed from Mabel Durbin he obtained nothing more than an equitable assignment of her rights in the decree of foreclosure and placed himself in her shoes—i. e., he became the mortgagee and judgment creditor subject to redemption, and his relationship to George W. and Minnie L. Durbin was identical with the relationship which had theretofore existed between Mabel and George as mortgagee and mortgagor. It is, therefore, necessary to consider the nature of this relationship, the relationship of the parties to each other, the surrounding circumstances, and the things that happened in connection with and immediately following the execution of the deed from Mabel."

Then follow a discussion and findings on the evidence and an evaluation of same by the Court and a finding that the testimony of George W. Durbin and Minnie L. Durbin that Koeberlein agreed to advance the money to Mabel and give George and Minnie time to redeem needed no great amount of corroboration. Again we quote (R. 344):

"George W. Durbin and Minnie L. Durbin each testified that Koeberlein offered to settle with Mabel, take over the indebtedness and give them two years at seven per cent interest within which to redeem and that they quitclaim to him for the purpose of carrying out that arrangement. They were corroborated by one of their children, who claims to have been home at the time and to have heard part of the conversation. In the

view which we take of the case and the evaluation which we place on Koeberlein's testimony, their testimony requires no great amount of corroboration."

The Court then, in its opinion, again refers to the theory of petitioner's case, as shown by the pleadings, and the legal effect of same, and analyzes the evidence bearing on the issues raised by the contention of petitioner in his pleadings (R. 344):

> "We have pointed out above that by his deed from Mabel Durbin, Koeberlein took no legal title, but merely an equitable assignment of her rights as mortgagee and foreclosure creditor. We also noticed that Koeberlein's theory of the case is disclosed by his answer that he had taken the quitclaim deed from the Durbins merely for the purpose of extinguishing their right of redemption. This answer clearly places him, on his own theory of the case, in the position of a mortgagee dealing with his mortgagor for a conveyance of the mortgagor's equity. This relationship is one about which the law is very strict, not only in Illinois, but everywhere. While it is not legally impossible for a mortgagee to acquire the mortgagor's equity of redemption, yet such a transfer or agreement to transfer is one that is jealously regarded by a court of equity and which will be strictly scrutinized for evidence of oppression, fraud or unfairness. It is the spirit and intent of our law and it is our public policy, as declared by the statutes of this state, that mortgagors shall have a reasonable time within which to redeem, and such laws have always been liberally construed. Reflection makes it apparent that our public policy as to redemption could not be maintained under any other rule."

We agree with the statement of petitioner that the questions touching the lease of The Carter Oil Company are not here involved. The Supreme Court of Illinois affirmed the

decree of the lower court, finding in favor of The Carter Oil Company. That finding was not questioned on petition for rehearing, and a stipulation was entered into between The Carter Oil Company and petitioner, in which petitioner recognizes the validity of said lease, which said stipulation has been filed in the Circuit Court.

SUMMARY OF ARGUMENT.

No Grounds Exist Which Would Justify the Exercise by This Court of Its Power to Grant a Writ of Certiorari.

I.

The power of this Court in granting certiorari to review the decision of the Supreme Court of the state is limited by Section 237 of the Judicial Code (28 U. S. C. A. 344). The petition fails to show that any title, right, privilege or immunity was specially set up or claimed by either petitioner or respondents under the Constitution of the United States. Therefore no question is presented by this record which gives this Court jurisdiction to grant certiorari.

II.

The Supreme Court of Illinois properly decided the case under the pleadings presented, and had a right to make the findings and reach the conclusion on the record presented.

ARGUMENT.

No Grounds Exist Which Would Justify the Exercise by This Court of Its Power to Grant a Writ of Certiorari.

I.

This Court has no power or jurisdiction to grant a writ of certiorari for the purpose of reviewing the decision of the Supreme Court of the state unless the record shows that the case comes under Section 237 of the Judicial Code (Title 28, Par. 344). Here it is claimed by petitioner that a question concerning the Constitution of the United States is involved and that his rights under the Fourteenth Amendment to the Federal Constitution have been violated. In other words, it is claimed that in this case the title, right, privilege and immunity of petitioner was specially set up and claimed under the Constitution of the United States. An examination of the record here shows that such is not the fact; that petitioner never did set up any rights under the Federal Constitution; that petitioner did not raise any question of a violation of his rights under the Fourteenth Amendment, even in his petition for rehearing, but based his right to a rehearing on the ground that the Supreme Court found from the evidence that the petitioner had been unfair in his dealings, and that his evidence against that of George W. Durbin and Minnie L. Durbin had little weight; that the Court had no right to find from the evidence that petitioner was guilty of fraud, overreaching, or unfair dealing, because there was no such allegation in the pleadings, and that if such allegations had been made petitioner could and would have produced evidence which might have given the Court a better opinion of him and his testimony. We submit that no question of the Federal Constitution ever was or is presented in this record, and that no title, right, privilege or immunity was specially set up or

claimed by either party under the Federal Constitution, and that there are no grounds whatever for this Court assuming jurisdiction herein. On the contrary, under the statute this Court does not have jurisdiction.

II.

The decision of the Supreme Court of Illinois was proper under the pleadings. Petitioner, by his pleadings, acknowledged himself to be in a fiduciary relationship to the respondents. The Supreme Court found that this was the true construction of his pleadings, and found that petitioner had failed to discharge his obligation as such fiduciary. When it was determined that he occupied a fiduciary relationship, his fraudulent conduct was at issue. It is not necessary that the legal result of such relationship be pleaded. There was no denial of due process or any interference with a federal right in this case, because the matters decided were distinctly in issue. The decision of the Supreme Court was right, but even if wrongfully decided, this Court will not take jurisdiction to determine whether the Supreme Court of Illinois correctly applied the decisions that had been heretofore made by that Court.

We submit that a party is bound by his pleadings and his evidence even though he may have in mind a legal effect different from the construction the reviewing Court places upon the pleadings.

We think the cases cited by petitioner are not authority in this case for the reason that the facts are not at all similar.

In Hormel v. Helvering, 61 S. Ct. Rep. 719 (pp. 15-16 Petition), the Court say:

> "Because of conflicts among the Circuit Courts of Appeals on the propriety of considering Sec. 22 (a), under these circumstances we granted certiorari."

And in Helvering v. Tex-Penn Co., 300 U. S. 481 (pages 16-17 of Petition), which was a tax case, the Supreme Court declined to consider the contention of the Commissioner because he never made the contention at any time before hearing in Supreme Court, not even in his petition for certiorari.

The case of Helis v. Ward, 308 U. S. 365 (page 24 of Petition), is, in our opinion, authority that a court of review may place a different interpretation on written pleadings than did the trial court. In that case the District Court made a finding on a contract. The Circuit Court of Appeals placed a different construction on the pleaded instrument, reversed the decision and directed entry of judgment for plaintiff. Held on certiorari that failure of Circuit Court of Appeals to remand case for new trial did not deprive defendant of his day in court or violate his constitutional rights. And the Court say:

> "The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not, per se, sufficient to cause a remand for a new trial under the rule in Saunders v. Shaw, 244 U. S. 317."
>
> "To be sure, Petitioner now asserts that on a new trial he would attack the competency and accuracy of the Umpire's report."

In the case of Saunders v. Shaw, 244 U. S. 318 (Petition, pp. 24-25), the defendant was denied the right to offer any evidence for the reason that when defendant made offer of his testimony it was ruled inadmissible and the defendant had no evidence, and under such circumstances he had not had "his day in court."

Petitioner cites and quotes Union Cem. Association v. Kansas City, 252 Mo. 466 (Petition, p. 26). The quoted part of the opinion, on page 26 of the petition, is in answer to a "request" which in the printed opinion is as follows:

> "Judge L. C. Slavens appeared in this Court (the Supreme Court) as counsel for certain lot owners in the capacity of intervenors, I suppose, but who were not represented in the Court below, and asked that this Court find and decree that the cemetery owes certain duties to preserve and beautify the cemetery and the graves thereof, and that this Court require the officers thereof to provide and set apart a fund sufficient and out of which said cemetery may be preserved, cared for and with which to beautify the graves therein."

We submit that the facts in the last above cases are so different from the facts in the case between petitioner and respondents that it does not rise to the dignity of authority herein.

In the case of Castle v. Persons, 117 Fed. 835 (page 26 of Petition), petitioner quotes the words of Judge Sanborn, which only stated a general rule. The case was not reversed on any ground of lack of due process. The trial court had evidence before a jury and directed a verdict.

Judge Carland, of the reviewing Court, rendered the opinion and reversed the case because he said there was evidence which required submission to a jury. Judge Thayer dissented and said the trial judge was right. Judge Sanborn concurred and in his concurring opinion used the quoted language in the petition herein (p. 26).

This is a suit in equity and the oft-quoted maxims and rules of equity were invoked and enforced by the reviewing Court. The Court found and decreed from the evidence that petitioner did not do equity and that he should return what he took with unclean hands.

Paragraph II of petition, page 18, states:

> "The Supreme Court of Illinois based its decision entirely upon a proposition of fact and a theory not presented in the pleadings of any of the parties, or

raised or litigated at the trial, or presented or argued in the briefs of the parties filed in the Supreme Court."

The petitioner then says that by their pleadings respondents contended that an agreement was made between respondents and petitioner that respondents were to have two years to repay petitioner the amount petitioner had paid to Mabel Durbin under the foreclosure decree, and upon such payment respondents were to receive a conveyance of the property from petitioner. That the conveyance from respondents to petitioner was intended to be a mortgage. That petitioner joined issue. On this issue the Supreme Court found as follows (R. 344):

> "George W. Durbin and Minnie L. Durbin each testified that Koeberlein offered to settle with Mabel, take over the indebtedness and give them two years, at seven per cent interest, in which to redeem and that they quitclaimed to them for the purpose of carrying out that arrangement. They were corroborated by one of their children, who claims to have been home at the time and to have heard part of the conversation. In the view we take of the case and the evaluation we place on Koeberlein's testimony their testimony requires no great amount of corroboration."

This language is certainly a finding on a litigated issue and a direct finding that George W. Durbin and Minnie L. Durbin had proved their contention, that is, that the deed they made to Koeberlein was only a mortgage with the right to redeem in two years, and thus the relation of mortgagors and mortgagees existed.

But the Supreme Court of Illinois said that under the pleadings of petitioner, by his deed from Mabel Durbin, he took no legal title as petitioner claimed he did, but even under that deed had only an equitable title and became during the period of redemption only a mortgagee in the stead of Mabel Durbin (R. 344). The reviewing Court

certainly had the right to interpret the pleadings, even if their interpretation differed from that of petitioner. Petitioner said by his pleading that he took a deed from Mabel Durbin and husband that vested in him a fee-simple title to the land. The Supreme Court said that the deed only gave petitioner an equitable assignment of the rights of Mabel Durbin as mortgagee and foreclosure creditor, and then follow with their finding from the evidence the lack of veracity, frankness, and fair dealing. The Court found from the evidence that petitioner tricked and defrauded respondents. That his testimony showed lack of frankness and honesty and other frailties. He now says if he had known the Supreme Court was going to say all those things about him, if he had been warned by pleadings or allegations that he was suspected, he could have painted a different and more pleasant picture. However, he submitted his own pleadings, did his testifying, produced many witnesses to sustain his position, and if the Court found from evidence that his conduct was not fair, honest, and equitable and so decreed, we fail to see where any provision of the Constitution has been violated.

The case, Windett v. Ruggles et al., 151 Ill., page 184, at 190, was a consolidated case. It was claimed that the reviewing Court erred in adjusting equities in a bill as amended without there being any answer to the bill or otherwise put at issue, and therefore it could not have been adjudicated upon. The Court, in its opinion, page 190, say:

> "This Court had jurisdiction of the appeal from the final decree in the consolidated case. On reversal of the decree, it had power itself to enter such decree as in its opinion, upon the whole case, was consonant with justice and equity, or it might, in its discretion, remand the case to the Court below with directions as to the decree to be entered. And in determining the nature and provisions of the appropriate decree, it was not

> limited to the precise question upon which the Court below had rendered its decision, but was at liberty to consider and adjust all the equities of the case, so far as presented by the pleadings and the proof. If, inadvertently or otherwise, it passed upon the equities of a bill to which no answer had been filed, such action was at most a mere irregularity which in no way impaired the binding and conclusive effect of the final judgment of the Court."

And Helis v. Ward, 308 U. S. 365, enunciates the same doctrine in these words:

> "The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not, per se, sufficient to cause a remand for a new trial under the rule of Saunders v. Shas, 244 U. S. 317."

Petitioner states two reasons why writ in this case should be granted (p. 10 of Petition):

1. That respondents alleged the existence of an agreement between them and petitioner, under which respondents had the right to redeem. That petitioner met this issue successfully in the trial court. That the reviewing Court, in reversing the decree, wholly ignored this issue.

We submit that it requires only a glance at the Court's opinion to be convinced that the above issue was considered by the reviewing Court, the evidence considered and evaluated and a finding that upon that question the Durbins needed little corroboration (R. 344).

2. The second reason urged by petitioner in support of his petition is that the opinion of the Supreme Court of Illinois brands petitioner as a crook and perjurer and as devoid of morals and ethics. That his reputation as merchant and banker is impugned. And further says that his conduct in connection with the transaction involved was not even questioned by respondents.

We respectfully submit that his conduct, his purposes and his statements were questioned by respondents and made a sharp issue by the testimony.

The Supreme Court of Illinois passed upon the evidence. That Court was not impressed with the testimony of petitioner, or his veracity, fairness or honesty, as shown by the evidence. Certainly it will not be contended that the court of review did not have the right to disbelieve petitioner or ascribe to him improper conduct, motives, statements, if, in the Court's opinion, the evidence so showed. We insist that the opinion points out the obliquities, frailties, trickery, as shown by the evidence whereby the court of review places its estimate on petitioner, his purposes and intents, and the value of his testimony.

It is, therefore, respectfully submitted that the petition presents no grounds which would justify the exercise by this Court of its power to grant a writ of certiorari to the Supreme Court of Illinois, as the record shows, first, that no federal question was or is presented by this record; and, second, that the decision of the Supreme Court of Illinois was correct.

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